APPENDIX A.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
Jackson, Mississippi

March 5, 1964

(FIL MAR 5 1964)

William Harold Cox
District Judge

Re: Joe Graham Post #119
American Legion v. U.S.
Civil Action 2614 (S)(C)

Dear Sirs:

The plaintiff filed this suit on November 26, 1962, to recover and effect a refund of income taxes duly assessed and paid for the fiscal year July 1, 1960, to June 30, 1961. The defendant has moved to dismiss for lack of jurisdiction on two grounds presently discussed.

The plaintiff filed a petition with the Tax Court on August 1, 1963, for a redetermination of its income taxes for the period December 31, 1944, to December 31, 1960. The last six months of the period mentioned overlaps the first six months of the fiscal year involved in this suit. The statute provides that to the extent that the Tax Court has jurisdiction that this Court loses jurisdiction. Section 7422(e), Internal Revenue Code 1954. The United States then contends that *Flora v. U. S.*, 80 S.Ct. 630, impels the

conclusion that this Court, therefore, has no jurisdiction of this suit. That case is authority for the position that a district court does not have jurisdiction of a claim for a part of a tax period, that is to say, that a taxpayer may not pay less than all of his taxes for any tax period and sue for a recovery thereof, but must pay all of such taxes for such period and then he may sue for a recovery of the entire tax.

With the case in part pending before the Tax Court, this Court surely would have no jurisdiction to invade that area of the case which is pending before that Court, but it does not follow that this Court does not have jurisdiction of the last half of the fiscal year in suit.

The teaching of *Flora v. U. S.*, to the effect stated is not in conflict with the idea that the Congress has conferred jurisdiction upon this Court to entertain a suit for that part of the controversy which is not preempted as indicated. The motion before the Court is for a dismissal of the suit, not for a declaratory judgment as to a part of the suit and it is the opinion of the Court that such motion is thus without merit and should be overruled.

An order to the effect stated may be presented for entry.

Yours very truly,
Harold Cox /s/

WHC:afc
Mr. William E. Logan
Mr. Stanford E. Morse, Jr.
Mr. Edwin R. Holmes

APPENDIX B.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21431

UNITED STATES OF AMERICA,
Appellant,

versus

JOE GRAHAM POST NO. 119, AMERICAN LEGION,
Appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

(January 25, 1965.)

Before TUTTLE, Chief Judge, JONES and ANDERSON,* Circuit Judges.

ANDERSON, Circuit Judge: In 1946 the appellee taxpayer was advised, through a group ruling by the acting Deputy Commissioner of Internal Revenue, that it was granted an exemption from Federal Income Tax. On September 13, 1961, however, the Commissioner directly notified the taxpayer that its exempt status had been revoked because it had allegedly engaged in the movie theatre and cafeteria business with the general public.

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* Of the Second Circuit, sitting by designation.

On March 15, 1962 the taxpayer filed an untimely corporate income tax return for the *fiscal* year ending June 30, 1961 and, at the same time, paid in full the tax, penalty and interest as reflected in the return in the total amount of $1290.48. On April 2, 1962 the taxpayer filed a timely claim for a refund of the amount paid. As no action was taken with respect to it by the Commissioner for more than six months, and as the taxpayer had fulfilled the conditions of §7422(a) of the Internal Revenue Code of 1954, it brought the present action for refund on November 26, 1962 in the United States District Court.

Following the loss of the taxpayer's exempt status in 1961, the Commissioner on June 28, 1963 asserted deficiencies in the taxpayer's income tax for the *calendar* years 1944 through December 31, 1960 for the total amount of $118,265.66. The taxpayer on August 1, 1963 filed a petition with the Tax Court contesting the deficiency assessed for each of these years, including the *calendar* year January 1, 1960 through December 31, 1960; and specifically assigned as error on the part of the Commissioner the computation and determination of the "tax and penalties against petitioner on the calendar year basis." The Government then filed a motion in the refund action in the District Court to dismiss the complaint on the ground that the court had lost jurisdiction under the provisions of §7422(e) of the 1954 Code.[1] The District Court denied

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[1] The pertinent portions of §7422(e) read as follows: "(e) Stay of proceedings.—If the Secretary or his delegate prior to the hearing of a suit brought by a taxpayer in a district court or the Court of Claims for the recovery of any income tax, estate tax, or gift tax (or any penalty relating to such taxes) mails to the taxpayer a notice that a deficiency has been determined in respect of the tax which is

the motion to dismiss and, on certification by the trial judge, the Government has brought this appeal.

The question before this court is whether or not a taxpayer who, under §7422(e), exercises his option to contest in the Tax Court an alleged deficiency, assessed on the basis of the calendar year January 1, 1960 through December 31, 1960, loses his right to prosecute in the United States District Court an already pending tax refund claim for the *fiscal* year July 1, 1960 through June 30, 1961, which for a six months period overlaps the *calendar* tax year in issue before the Tax Court.

Central to the resolution of this issue is the matter of the correct accounting period. If the Government is correct and the calendar year basis is the proper one, then under the governing statute, §7422(e), the taxpayer by his petition to the Tax Court has elected to have that tribunal pass upon all issues relating to the assessment of a deficiency for the calendar year 1960, and the District Court has lost its jurisdiction over the refund case, because the 1961 fiscal year is not the correct accounting period and, in effect, the taxpayer would have paid a tax only on the income for one-half of the calendar year 1960. As income tax liability is for an entire year of income transactions, *Burnet v. Sanford & Brooks Co.*, 282 U.S. 359

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the subject matter of taxpayer's suit, the proceedings in taxpayer's suit shall be stayed during the period of time in which the taxpayer may file a petition with the Tax Court for a redetermination of the asserted deficiency, and for 60 days thereafter. If the taxpayer files a petition with the Tax Court, the district court or the Court of Claims, as the case may be, shall lose jurisdiction of taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of taxpayer's suit for refund. . . ."

(1931), the taxpayer cannot maintain a refund suit in the District Court when less than the tax for the entire income period has been paid. *Flora v. United States*, 362 U.S. 145 (1960).

If, on the other hand, the taxpayer is correct and it is properly on a fiscal year accounting basis, then the District Court retains jurisdiction of the refund case for the fiscal year July 1, 1960 through June 30, 1961.

We conclude that in this case the determination of the correct accounting period is a matter for decision by the Tax Court because the taxpayer elected to place the issue before that tribunal.

The provisions of §7422(e) are designed to give the taxpayer an option, once he has received a ninety day deficiency notice from the Commissioner, to petition the Tax Court for a redetermination of the asserted deficiency or to refrain from filing such a petition and, having paid the alleged deficiency in full, proceed in the District Court on its suit for refund. He cannot do both because §7422(e) says that if the taxpayer files a petition with the Tax Court, the District Court "shall lose jurisdiction of the taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of the taxpayer's suit for refund."[2]

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[2] The Senate Report, made in connection with the enactment of the 1954 Code, said of §7422(e):

"The result under subsection (e) is to give jurisdiction over the cause of action to only 1 court (2 courts may acquire jurisdiction under existing law), and to give the taxpayer the choice of which court shall have jurisdiction. The taxpayer, by filing a petition in the Tax Court, would cause that court to have sole jurisdiction, or, by failing to file a

While the language of the statute is more precisely adapted to a fact situation in which "the subject matter of taxpayer's suit" and the subject matter which, on petition by the taxpayer after reassessment of the deficiency, comes under the jurisdiction of the Tax Court, concerns exactly the same tax year or years, nevertheless, the intention and purpose of §7422(e) are clear; the taxpayer is to have a choice of tribunals to try all or a part of the issues which are within the subject matter of the refund suit; but both the District Court and the Tax Court cannot at the same time have jurisdiction over the same issues presented by that subject matter. As a result of the taxpayer's petition to the Tax Court the District Court lost jurisdiction to determine the threshold issue of whether or not the taxpayer properly used a fiscal year basis for its tax return for the year July 1, 1960 through June 30, 1961. But the District Court has not necessarily lost all jurisdiction. It is only this threshold issue as to the correct accounting period which was a part of the subject matter of the refund suit in the District Court which also became a part of the subject matter of the proceedings before the Tax Court. If the Tax Court decides that the taxpayer was correct in using a *fiscal* year accounting period for the tax year beginning July 1, 1960, then the Tax Court itself has no jurisdiction over alleged errors in any de-

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petition in the Tax Court, would cause the district court or the Court of Claims to have sole jurisdiction.

Subsection (e) does not apply if the case in the district court or Court of Claims has already proceeded to a hearing, that is, to actual trial. On the other hand, it will apply to prevent suit in the district court or Court of Claims after the receipt of a notice of deficiency in any case where the taxpayer appeals from that notice to the Tax Court." U.S. Code Cong. & Ad.

News, 83rd Congress, Second Session 1954, Vol. 3 at 5261.

ficiency for that period because the taxpayer qualified for the refund suit in the District Court within the provisions of §7422(a), and the entire subject matter relative to any deficiency on a fiscal year basis remained there except for the threshold question, as above mentioned.

The case must therefore be remanded to the District Court to await a determination by the Tax Court, and any court reviewing its decision, of the issue of the correct accounting period. Had the taxpayer limited its petition to the Tax Court under §7422(e) to the calendar years beginning January 1, 1944 and ending December 31, 1959, it could have continued to prosecute its refund action in the District Court, and that court would then have had jurisdiction to pass upon the question whether or not the fiscal year was the correct taxing period, as the Government would presumably have raised the issue by appropriate motion or by amended answer. As that issue is now before the Tax Court, this case is REMANDED to the District Court with direction to stay further proceedings until the issue of the correct accounting period has been finally adjudicated. If the decision is that the proper period is the fiscal year, the court will go forward with the trial; if the calendar year, the action must be dismissed for lack of jurisdiction.

APPENDIX C.

§ 7422. Civil actions for refund

(a) No suit prior to filing claim for refund.—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

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(e) Stay of proceedings.—If the Secretary or his delegate prior to the hearing of a suit brought by a taxpayer in a district court or the Court of Claims for the recovery of any income tax, estate tax, or gift tax (or any penalty relating to such taxes) mails to the taxpayer a notice that a deficiency has been determined in respect of the tax which is the subject matter of taxpayer's suit, the proceedings in taxpayer's suit shall be stayed during the period of time in which the taxpayer may file a petition with the Tax Court for a redetermination of the asserted deficiency, and for 60 days thereafter. If the taxpayer files a petition with the Tax Court, the district court or the Court of Claims, as the case may be, shall lose jurisdiction of taxpayer's suit to whatever extent jurisdiction

is acquired by the Tax Court of the subject matter of taxpayer's suit for refund. If the taxpayer does not file a petition with the Tax Court for a redetermination of the asserted deficiency, the United States may counterclaim in the taxpayer's suit, or intervene in the event of a suit as described in subsection (c) (relating to suits against officers or employees of the United States), within the period of the stay of proceedings notwithstanding that the time for such pleading may have otherwise expired. The taxpayer shall have the burden of proof with respect to the issues raised by such counterclaim or intervention of the United States except as to the issue of whether the taxpayer has been guilty of fraud with intent to evade tax. This subsection shall not apply to a suit by a taxpayer which, prior to the date of enactment of this title, is commenced, instituted, or pending in a district court or the Court of Claims for the recovery of any income tax, estate tax, or gift tax (or any penalty relating to such taxes).

Adm. Office, U. S. Courts—E. S. Upton Printing Co., N. O., La.

MEMORANDUM

IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 221

JOE GRAHAM POST NO. 119, AMERICAN LEGION,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1961 the Commissioner notified petitioner that its exempt status had been revoked for allegedly engaging in business activities. In March 1962 petitioner filed an untimely corporate income tax return for the period July 1, 1960 to June 30, 1961 and paid $1,290 of tax, penalty and interest shown on the return. Following a timely claim for refund, petitioner on November 26, 1962, filed a suit for refund in the district court (Pet. 11–12).

After revoking petitioner's tax exemption, the Commissioner in 1963 asserted deficiencies in income tax and penalties against petitioner for the *calendar years*

780-611—65

1944 through 1960, totaling $118,265. On August 1, 1963, petitioner filed a petition with the Tax Court contesting these asserted deficiencies, and specifically alleging that the Commissioner erred in determining the deficiencies on a calendar-year basis (Pet. 12).

The government then asked the district court to dismiss petitioner's complaint, which motion was denied (Pet. 9–10, 12–13). Upon certification, the court of appeals reversed and remanded to the district court with instructions to stay further proceedings until the Tax Court determines the correct accounting period (Pet. 11–16).

Whether petitioner properly should have reported its income on a fiscal- or calendar-year basis is not now before this Court. Rather, as the court of appeals recognized (Pet. 14), this appeal presents only the threshold question whether the district court or the Tax Court is the proper forum to decide petitioner's proper accounting period.[1]

The two principal remedies available to an aggrieved taxpayer are (1) a petition to the Tax Court for redetermination of a proposed deficiency, and (2) a suit for a refund in the district court or the Court of Claims after paying the deficiency in full. *Flora* v. *United States*, 362 U.S. 145. In order to insure that a taxpayer would not litigate in both forums at once, Congress passed § 7422(e) of the In-

[1] There is no basis for the taxpayer's statement (Pet. 5), that "[t]he government, in its reply brief before the Court of Appeals, states as a fact that the proper accounting period was a fiscal rather than a calendar year." To the contrary, this is the very question which the government contended below must be determined by the Tax Court.

ternal Revenue Code of 1954, which states that "If the taxpayer files a petition with the Tax Court, the district court * * * shall lose jurisdiction of taxpayer's [previously filed] suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of taxpayer's suit for refund." See *Flora* v. *United States, supra,* at 165–167.[2]

The petitioner filed the instant suit in the district court asking for a refund of his taxes for the fiscal year July 1, 1960, to June 30, 1961. The taxpayer subsequently filed a petition with the Tax Court for a redetermination of his tax liabilities for the calendar year 1960, specifically contesting the Commissioner's assertion of a deficiency on a calendar year basis. Both suits involve the period July 1 to December 31, 1960. This is precisely the type of case

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[2] See H. Rep. No. 1337, 83d Cong., 2d Sess., pp. 109, A431–A432; S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 149, 610–611:

> The result under subsection (e) is to give jurisdiction over the cause of action to only 1 court (2 courts may acquire jurisdiction under existing law), and to give the taxpayer the choice of which court shall have jurisdiction. *The taxpayer, by filing a petition in the Tax Court, would cause that court to have sole jurisdiction,* or, by failing to file a petition in the Tax Court, would cause the district court or the Court of Claims to have sole jurisdiction.
>
> Subsection (e) does not apply if the case in the district court or Court of Claims has already proceeded to a hearing, that is, to actual trial. On the other hand, it will apply to prevent suit in the district court or Court of Claims after the receipt of a notice of deficiency in any case where the taxpayer appeals from that notice to the Tax Court. [S. Rep. No. 1622, *supra,* at p. 611 (italics added).]

where Congress did not want the Tax Court and the district court to consider the same period simultaneously. Where, as here, cases covering the same subject matter are pending in both the district court and the Tax Court, Congress has given jurisdiction to the Tax Court regardless of which case was filed first (§ 7422 (e), Internal Revenue Code).

As the court of appeals in this case correctly held, if the Tax Court decides that petitioner was properly on a fiscal year ended June 30, the district court may then go forward with the instant case; if, on the other hand, the Tax Court holds that the taxpayer should have reported income on a calendar year, the district court loses jurisdiction of the instant case because the taxpayer did not pay the full amount of the tax due for the calendar year but only paid tax on a part of its 1961 income. See *Flora* v. *United States*, 362 U.S. 145. In either event, the district court must stay proceedings in this suit until the Tax Court decides whether petitioner's 1960 income should be reported on a calendar- or fiscal-year period; and, accordingly, we respectfully request that the petition for certiorari be denied.

ARCHIBALD COX,
Solicitor General.
JOHN B. JONES, JR.,
Acting Assistant Attorney General.
DAVID O. WALTER,
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Attorneys.

JULY 1965.

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